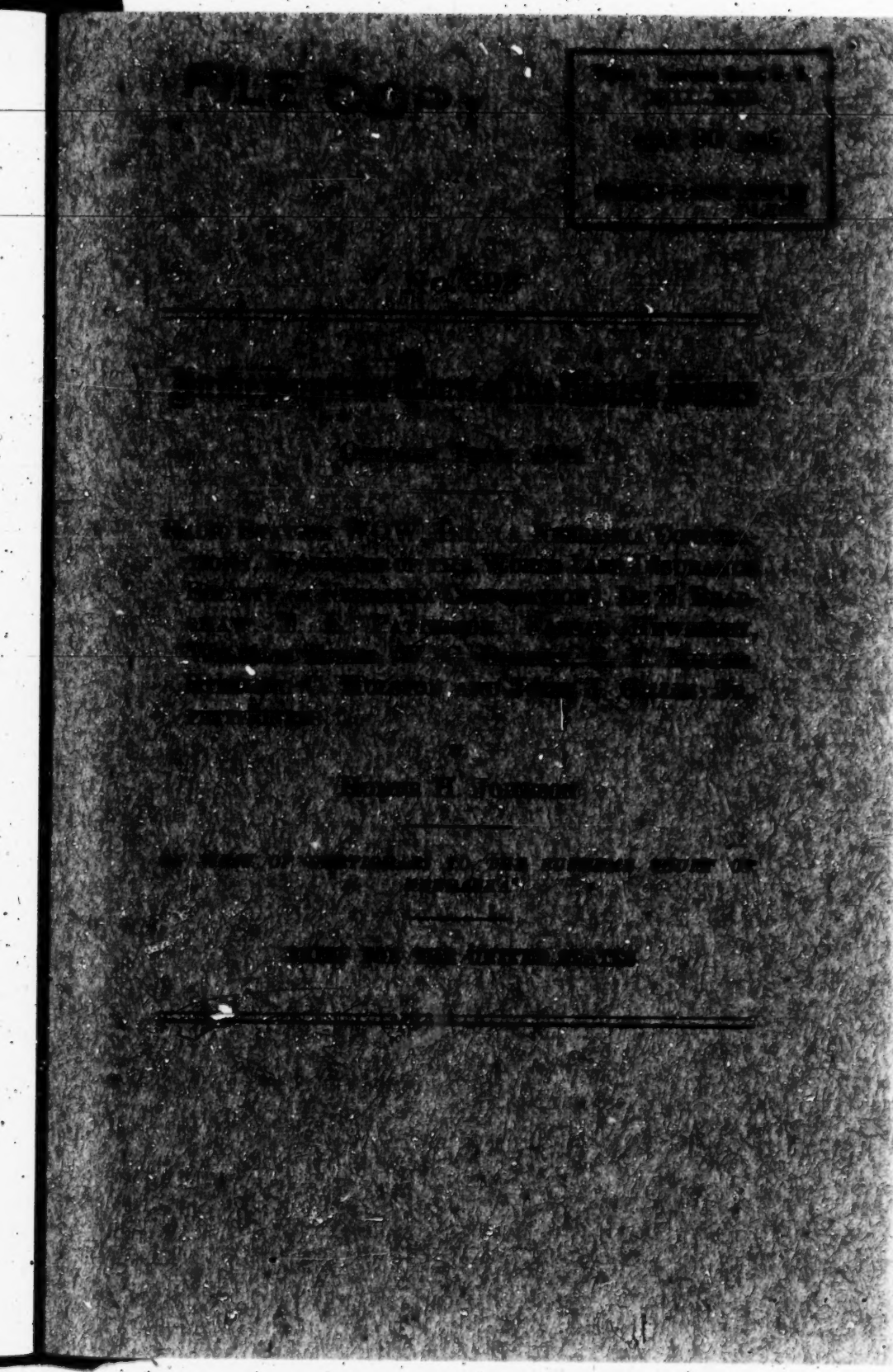

INDEX

	Page
Statement	2
Argument:	
I. The Nebraska courts have jurisdiction to entertain this suit, and the judgment below in so far as it determines merely the disposition of the physical property of the radio station is not an invasion of the jurisdiction of the Federal Communications Commission	5
II. The state court had no power to order a return of the Federal broadcasting license or to direct the parties with reference thereto	12
III. The need for a practical adjustment of the state court's jurisdiction over the physical property to the Federal Communications Commission's jurisdiction with respect to the broadcasting license suggests that the court below should stay its judgment until the Commission has passed upon an application for a transfer of the license	14
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Addison v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607	15
Atchison, T. & S. F. Ry. v. *Wells*, 265 U. S. 101	6
Atchison, Topeka & S. F. Ry. Co. v. *Railroad Comm.*, 283 U. S. 380	19
Atlantic City, City of, 7 F. C. C. 485	11
Boston, Revere Beach & Lynn R. Co., Re, 31 P. U. R. (N. S.) 257	7
Buffalo Broadcasting Corp., 9 F. C. C. 31	11
Central New England R. Co. v. *Boston & Albany R. Co.*, 279 U. S. 415	7
Central Securities Corp. v. *United States*, 278 U. S. 12	7
Chicago, R. I. & Gulf Ry. Co. v. *Tarrant County W. C. & I. Dist.* (Tex. Civ. App.), 76 S. W. 2d 147, cert. den., 295 U. S. 762	7
Davis v. *Cleveland, C. C. & St. L. Ry.*, 217 U. S. 157	6
Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U. S. 470	8
Flamm, Donald J., 8 F. C. C. 325	2
General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422	20

Cases—Continued. Page

Hearst Radio, Inc., 7 F. C. C. 292 11

Hudson River R. Dist. v. *F., J. & G. R. R. Co.*, 249 N. Y. 445 19

International Milling Co. v. *Columbia Transportation Co.*, 292 U. S. 511 6

Jackman et al., 5 F. C. C. 496 18

Leese, M. A., 5 F. C. C. 364 9

Missouri-Kansas-Texas R. R. v. *Mars*, 278 U. S. 258 6

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 20

N. Y. Central Securities Corp. v. *United States*, 287 U. S. 12 7

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 20

Seitz et al., 7 F. C. C. 315 18

St. Louis, etc. Ry. Co. v. *Brownsville Nav. District*, 304 U. S. 295 20

State v. *Atlantic Coast Line R. Co.*, 103 Fla., 1204, cert. den., 286 U. S. 557 19

Terminal Warehouse Co. v. *Pennsylvania R. R. Co.*, 297 U. S. 500 16, 20

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 20

Travelers Broadcasting Service Corp., 6 F. C. C. 456, 7 F. C. C. 594 18

U. S. Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 20

Warren v. *Palmer*, 310 U. S. 132 7

Western Broadcast Co., 3 F. C. C. 179 17

WMCA Inc. (F. C. C.), decided November 16, 1943 10, 23

Statutes:

Chandler Act, Sec. 1 (47 U. S. C. Secs. 577, 578) 19

Communications Act of 1934:

Sec. 3 (h) (47 U. S. C. Sec. 153h) 8

Sec. 214 (47 U. S. C. Sec. 214) 8

Sec. 310 (b) (47 U. S. C. Sec. 310 (b)) 2, 5, 8

Miscellaneous:

68 Cong. Rec. 2573–2574, 2578–2579, 2869–2882, 4150–4153 19

Dissent of Commissioner Clifford J. Durr, July 26, 1944 19, 28

Federal Communication Commission, Rules and Regulations, Sec. 3.71 (47 C. F. R. (Cum. Supp., 1943) Sec. 3.71) 8

Letter from Chairman of F. C. C. to Senate and House committees, dated July 24, 1944 18, 26

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

v.

HOMER H. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE UNITED STATES

This brief is filed pursuant to the Court's request of March 8, 1945 that the Solicitor General, if so advised, file a brief in the present case dealing with "the question to what extent, if any, does the Federal Communications Act restrict the jurisdiction of the state court to give the relief which it has granted in this suit".

STATEMENT

Prior to January, 1943, Radio Station WOW in Omaha, Nebraska, was operated by its owner, the Woodmen of the World Life Insurance Society. The Society having determined that its activities should be confined to the insurance business and that it should divest itself of its radio interests, entered into an agreement dated October 3, 1942, providing for the lease of its radio station properties to Radio Station WOW, Inc., and for the transfer to the lessee of the broadcasting license for the station, issued to the Society by the Federal Communications Commission, provided the Commission should consent to the transfer as required by Section 310 (b) of the Communications Act of 1934, 47 U. S. C. Sec. 310 (b).[1] (R. 21–28.) On December 15, 1942, the Commission consented to the transfer (R. 660–661; Ex. 32, R. 662A) and afterward declined to extend the time limit upon its permission. (R. 664.)[2]

[1] Section 310 (b) provides:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[2] Failure to transfer the license within the time limited would have meant simply that another application would have been required for permission to transfer at a later date. Cf. *Donald J. Flamm*, 8 F. C. C. 225, 327.

The transfer was then consummated and the station has since been operated by Radio Station WOW, Inc.

Prior to the Commission's action the respondent, a member of Woodmen of The World Life Insurance Society, filed suit in the District Court of Douglas County, Nebraska, on behalf of himself and all other members of the Society, seeking to set aside the lease transaction on grounds of fraud and lack of authority on the part of the individual defendants as officers of the Society to enter into it. (R. 1–10.) The trial court entered a decree for the defendants, petitioners here. On appeal the Supreme Court of Nebraska reversed the decree of the district court (R. 745–761), three of the seven judges dissenting (R. 761–769). The court's judgment (R. 744–745), in addition to ordering the cancellation of the lease of the radio station, directed that "the transfer of the license to operate the station be vacated and set aside; * * * that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose * * *". The opinion of the court concludes that there was constructive fraud in the lease transaction, inferable from the terms of the transaction and the circumstances surrounding it. The Woodmen of the World Society, the court stated (R. 760), "obtained an extremely excessive reduction in its income" from the station as a

result of the lease, "without a complete disposition thereof". The court further found that the resources of the lessee corporation were inadequate to assure performance of its undertaking to provide new equipment as might be required by advances in the art of broadcasting (R. 759–760); that certain of the purposes which had been stated as grounds for the disposition of Station WOW by the Society would not be fulfilled under the terms of the lease (R. 760); and that the lease transaction was brought about in part by the desire of the president of the Society to effect an arrangement which would continue the previous manager of the station in control of its operations.

When the jurisdiction of the Federal Communications Commission was brought to the attention of the Supreme Court of Nebraska in a petition for rehearing (R. 775–781), that court entered a further opinion (R. 794–799) stating (R. 798) "* * * this court has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter exclusively within the granted powers of the commission. * * * Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion." The court, however, entered an order denying motions for rehearing (R. 794) and did not amend its original judgment.

ARGUMENT

I

THE NEBRASKA COURTS HAVE JURISDICTION TO ENTERTAIN THIS SUIT, AND THE JUDGMENT BELOW IN SO FAR AS IT DETERMINES MERELY THE DISPOSITION OF THE PHYSICAL PROPERTY OF THE RADIO STATION IS NOT AN INVASION OF THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION

Under Section 310 (b), *supra*, p. 2, the consent of the Federal Communications Commission is necessary for the transfer of a broadcasting license, but no permission is necessary from the Commission before the physical equipment of the station may be sold. Nothing in the Act leads to the conclusion that transactions involving the property used in radio broadcasting may not be dealt with legally in the ordinary courts of the land. Hence, if Radio Station WOW, Inc. had defaulted in its obligations to the Society under the lease here involved, suit might have been brought upon the contract in the state court. Similarly, a state court clearly has jurisdiction to foreclose a mortgage on the physical properties of a radio station in the event of a default. Station property may be sold for unpaid taxes in the same manner as other property. State probate courts have jurisdiction to determine title to radio properties upon the death of the owner. And if the owner of a station should through error as to his title build the station on another's land, the

landowner could bring an ejectment proceeding in the state court. In short, the formation and termination of broadcasting enterprises and the acquisition, encumbrance, and disposition of property used in broadcasting are subject to the laws which govern business enterprises and transactions generally.

The cases cited by petitioners (Br. 37) in support of the "principle at common law that property devoted to a public service will not be separated from the franchise it is necessary to effectuate" and of the proposition that "rights asserted against that property are subordinate to that principle in order to protect the public interest", all hold either that asserted liens or attachments are not applicable to public utility property or that equity may prevent the enforcement of a lien against such property if the sale of the property might force the abandonment of the public service to which it has been devoted. Even as respects utility property, applicable liens may be enforced if the public service is not thereby endangered. *Missouri-Kansas-Texas R. R.* v. *Mars*, 278 U. S. 258; *Davis* v. *Cleveland, C. C. & St. L. Ry.*, 217 U. S. 157; *Atchison, T. & S. F. Ry.* v. *Wells*, 265 U. S. 101. The fact that a steamship is engaged in interstate commerce does not render invalid an attachment upon it. *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511. A State may con-

demn a portion of a railroad line for non-transportation purposes, without reference to Federal authority. *Chicago, R. I. & Gulf Ry. Co.* v. *Tarrant County W. C. & I. Dist.* (Tex. Civ. App.), 76 S. W. 2d 147, certiorari denied, 295 U. S. 762. Conversely, a permissive order of a regulatory agency does not deprive the courts of jurisdiction with reference to property or contracts or legal obligations which the order may incidentally affect but which were not before the agency for consideration. *Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415; cf. *N. Y. Central Securities Corp.* v. *United States*, 287 U. S. 12, 26–27. By a parity of reasoning, it seems clear that the courts have jurisdiction with reference to the physical property of radio stations notwithstanding the licenses issued by the Commission.

Nor is a court which has jurisdiction deprived of power to render a judgment with respect to the property of a radio station merely because the effect may be to shut off broadcasting by the station. The Communications Act contains no provision for the continuance of broadcasting until permission to abandon service is obtained, such as frequently appears in statutes which regulate public utilities. Cf. *Warren* v. *Palmer*, 310 U. S. 132, 137–138; *Re Boston, Revere Beach & Lynn R. Co.*, 31 P. U. R. (N. S.) 257 (Mass.

Dept. of Public Utilities, 1939); Section 214 of the Communications Act, 47 U. S. C. Sec. 214, affecting carriers by wire or radio. On the contrary, Section 3 (h) of the Act, 47 U. S. C. Sec. 153 (h), as this Court recognized in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474–475, provides expressly that broadcasting stations are not common carriers. Section 3.71 of the Commission's Rules and Regulations, 47 C. F. R. (Cum. Supp., 1943) Sec. 3.71, prescribes a minimum operating schedule for radio stations and sets forth a procedure whereby stations may secure permission to cease operation for a limited period of time while retaining their licenses; but this regulation does not prevent a licensee from ceasing operation either voluntarily or under legal compulsion, with consequent loss of the broadcasting license.

We believe, therefore, that no sound basis exists for petitioners' contention that the courts of Nebraska were without jurisdiction of the subject matter of the present suit and without power to enter a judgment after appropriate proceedings. The Federal Communications Commission is fully empowered to protect the public interest entrusted to it by Section 310 (b) of the Communications Act, *supra*, p. 2, in any proceeding for a transfer of the broadcasting license which may result from the disposition of the physical prop-

erty of Radio Station WOW by the judgment in this case. Its action with respect to the license will in no wise be foreclosed or governed by the judgment with regard to the property.

The Federal Communications Commission has consistently adhered to this view and has declined to assert authority with respect to the control of radio station property. In *M. A. Leese*, 5 F. C. C. 364, it appeared that the M. A. Leese Radio Corporation, which was formerly the licensee of Station WMAL, had previously assigned the station license with the consent of the Commission and had leased the physical property to the assignee, retaining title to the property in itself. Subsequently the stockholders of the Corporation agreed to sell their shares to the Evening Star Publishing Company. A petition was filed with the Commission requesting that the Commission either give its consent to the transfer of control of the corporation or declare that its consent was not necessary. The Commission held that consent was not necessary, saying (p. 365):

> Accordingly, upon consideration of the petition, the Commission is of the opinion and so finds that insofar as any sale or transfer of control of stock involving the physical equipment of radio Station WMAL is concerned, neither Section 310 (b) of the Communications Act of 1934, nor any other provision of that Act prohibits such transfer, nor does the Com-

> mission have jurisdiction with regard to the matters presented in said petition on the basis of the facts therein stated.

The same principle has recently been reiterated by the Commission in the case of *WMCA Inc.*, decided November 16, 1943 (Appendix, *infra* pp. 23–26). That case involved a transfer of the license of Station WMCA from WMCA, Inc. to Cosmopolitan Broadcasting Corporation. WMCA had formerly been owned by Flamm who had sold it to Noble, sole owner of WMCA, Inc. Subsequently Flamm brought suit in a New York State court, alleging that the sale to Noble was induced by fraud, duress, conspiracy, and undue influence and seeking rescission of the sale. Flamm petitioned the Commission for leave to intervene in connection with the subsequent application for transfer of the license from WMCA, Inc. to Cosmopolitan Broadcasting Corporation, pointing out that the suit was still pending and asking permission to show that the Commission should withhold action until it should be determined. The Commission denied the petition, saying:

> As a legal matter * * * petitioner's argument misconceives the respective jurisdictions of the Court and this Commission. On the one hand, the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and

other assets of Station WMCA. The Commission has no power to act with respect to these matters and any action it takes in the present proceedings will not affect the Court's jurisdiction.

On the other hand, the Commission has, under the Communications Act of 1934, as amended, exclusive jurisdiction to determine whether in any particular case, the license of Station WMCA to engage in radio broadcasting should be assigned in the public interest, convenience or necessity. Should petitioner prevail in his action, neither the Court nor Noble, acting pursuant to its order, has power to restore the license of Station WMCA to him without consent of the Commission. Commission consent to the proposed assignment, therefore, does not affect any remedy which it is within the Court's power to afford.

See also *Hearst Radio, Inc.*, 7 F. C. C. 292; *City of Atlantic City*, 7 F. C. C. 485; *Buffalo Broadcasting Corp.*, 9 F. C. C. 31.

As respects jurisdiction over the physical property of Station WOW, the situation is essentially the same in the present case. This fact does not, however, deprive this Court of jurisdiction and require dismissal of the cause if, as we shall contend, the judgment of the Supreme Court of Nebraska invaded the statutory authority of the Federal Communications Commission in certain respects.

II

THE STATE COURT HAD NO POWER TO ORDER A RETURN OF THE FEDERAL BROADCASTING LICENSE OR TO DIRECT THE PARTIES WITH REFERENCE THERETO

The judgment of the court below goes beyond a cancellation of the lease of Radio Station WOW and a provision for the return of the station's property to the Woodmen of the World Society. It attempts also to set aside the previous transfer of the broadcasting license, to order its return, and to compel the parties "to do all things necessary for that purpose". In these respects it goes too far and should, we believe, be set aside with directions to eliminate all provisions which purport to control the disposition of the license or to direct the parties with reference thereto.

The court below recognized in its opinion upon rehearing (R. 798) that the portion of its judgment ordering a return of the license invades the jurisdiction of the Federal Communications Commission under Section 310 (b) of the Act, *supra*, p. 2. However the court did not amend its judgment except in so far as its opinion on rehearing may be deemed to do so. The fact that this opinion also states (R. 799) that the court's prior opinion is adhered to leaves substantial doubt as to the precise requirements of the court's judgment. It is important that the judgment itself should clearly and accurately reflect

the respective jurisdictions of the state court and the Federal Communications Commission.

We believe, also, that the court may not attempt to control the action of the parties with respect to the Federal broadcasting license. Under the Communications Act of 1934 it is the responsibility of the Commission to grant or withhold broadcasting licenses in the public interest. The Commission's jurisdiction is invaded by a judgment which has the effect of preventing the petitioner Radio Station WOW, Inc., from opposing a return of the license to the Woodmen of the World Society, if it should so desire, and of disqualifying it, as the court's judgment probably does, from applying for a new license to operate a radio station in Omaha on the same frequency, should it become equipped to do so.

Similarly, the state court may not require the Society to come before the Commission and apply for authority to operate a broadcasting station if the Society, as this record indicates may be the case (R. 14-16, 287, 316), desires to confine its activities to the life insurance business. Such a requirement would force the Society into an anomalous position before the Commission and interfere with the Commission's ascertainment of the facts necessary for it to discharge its functions, which include ascertainment of the qualifications of an applicant to operate the station in question. The state court, we believe, may not properly go beyond attempting to create a situa-

tion in which an applicant may submit himself to the Commission in a proceeding to secure its consent to a transfer of the license, under an arrangement which will secure the interest of the Society under state law, although it may, of course, require the respondents who are officers of the Society to take steps to effect such an arrangement.

III

THE NEED FOR A PRACTICAL ADJUSTMENT OF THE STATE COURT'S JURISDICTION OVER THE PHYSICAL PROPERTY TO THE FEDERAL COMMUNICATIONS COMMISSION'S JURISDICTION WITH RESPECT TO THE BROADCASTING LICENSE SUGGESTS THAT THE COURT BELOW SHOULD STAY ITS JUDGMENT UNTIL THE COMMISSION HAS PASSED UPON AN APPLICATION FOR A TRANSFER OF THE LICENSE

Since, as we contend, the judgment below must be vacated, it may be pertinent to discuss certain aspects of the parallel jurisdictions of courts and the Federal Communications Commission which appear to have been overlooked by the court below and which should receive consideration in the disposition of this case. These should, we believe, lead to a stay of final judgment in the court below until the Commission has had an opportunity to pass upon an application for the transfer of the broadcasting license, growing out of these proceedings.

The court below, in seeking to undo the effects of the lease which it has found to be invalid, at-

tempts to secure to the Woodmen of the World Society the economic benefit which it enjoyed before from its ownership of Radio Station WOW. This is impossible unless the Federal Communications Commission consents to a disposition of the broadcasting license which is consistent with this end; for the station as an economic entity includes the license, and the major part of its value depends upon the license. Even the physical property is worth much more as an operating unit than as salvage. Nevertheless the judgment below is absolute. The court recognizes in its opinion upon rehearing that the Society as owner of the station may be deprived of much of the benefit of ownership if the Commission should decline to permit a restoration of the license to it. The risk of loss of an operating license is, it states correctly, one of the risks which all owners of broadcasting property must incur. (R. 797.) The hazard to station proprietors which springs from the existence of parallel jurisdictions over radio broadcasting is, however, one which may be minimized by resorting to those "resources of flexibility" of the judicial process to which this Court recently adverted in a situation calling for an accommodation between the necessities of adjudication and the requirements of preserving a statutory administrative authority. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 622. The performance of the Commission's functions

would also be aided by a conscious furtherance of harmony between its decisions and those of the courts, which, although possibly "difficult of attainment when jurisdiction is divided" (*Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.*, 297 U. S. 500, 513), may nevertheless be attempted; for, as we shall show, the action of the court in this case has a significant practical bearing upon the Commission's attainment of its statutory purposes.

Not only may the judgment in this case result in the public's loss of broadcasting services by Radio Station WOW for at least a period of time if the Commission declines to consent to a return of the license to the Woodmen of the World Society, but the grounds of the judgment as expressed in the court's opinion, together with the judgment itself, will bear upon the Commission's exercise of the authority committed to it by the Communications Act. The physical property of the station, over which alone the court claims jurisdiction, is worth not more than $175,000.[3] The radio station, which includes the physical property, the license, and the good will and going concern value, was leased by the Society to Radio Station WOW, Inc. for a fifteen year term under an agreement which the court found provided an

[3] The cost of the physical equipment was $175,000. It was stated at the trial to have been completely amortized (R. 581).

average net rental of $74,000 per year. This the court held to be inadequate (R. 756). Capitalizing this figure (cf. R. 513) produces a value of approximately $1,000,000, attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued, which would cease with a termination of the license.

The opinion of the court stresses factors which must enter into the Commission's consideration of an application by the Society for a return of the broadcasting license, notably the obligations to the Society of the officers who would be responsible for the conduct of the station.[4] The Commission's decision, in turn, if it could be known before the court gave final form to the discretionary decree which is appropriate in an equity proceeding, would obviously have a bearing upon the relief to be incorporated into the decree. A mutual accommodation of the decisions of court and Commission would contribute materially to the smooth

[4] The fiduciary obligations of a proposed station operator obviously are a factor to be weighed by the Commission in determining whether the broadcasting will be conducted in accordance with the public interest. We put to one side the question, scarcely determinable upon this record, whether the Commission may take account of the consideration paid for a station or the value which the operator would attribute to it, in passing upon an application for the issuance or transfer of a license. The Commission's practice on this point has not been uniform. Compare *Western Broadcast Company*, 3 F. C. C. 179, and

operation of the regulatory scheme established by Congress and to the attainment of the objects of state law.

Seitz et al., 7 F. C. C. 315 with *Jackman et al.*, 5 F. C. C. 496, and *Travelers Broadcasting Service Corp.*, 6 F. C. C. 456, 7 F. C. C. 504. The latest declaration of the Commission's practice in this matter is contained in a letter dated July 24, 1944 from the Chairman of the Commission to the chairmen of the Senate Interstate Commerce Committee and the House Interstate and Foreign Commerce Committee, in which it is stated that "the statute does make clear that the frequencies are not in any way the property of the licensees. The Commission has rejected and is prepared to reject any transfer which on its face involves a consideration for the frequency" but "has approved transfers that involve going-concern values, good will, etc." The letter states further that there is a serious question of policy upon which "the law is not clear, as to whether the Commission should approve a transfer wherein the amount of the consideration is over and beyond any amount which can be reasonably allocated to physical values plus going-concern and good will, even though the written record does not itself show an allocation of a sum for the frenquency." The letter calls attention to "the tremendously high prices which radio stations are commanding in the present state of the market" and continues that "under the present state of the law * * * it is not clear that the Commission has either the duty or the power to disapprove of a transfer merely because the price is inordinately high—even though it may well be deduced that a substantial value is placed on the frequency." The letter concludes that "in the absence of a clear Congressional policy on this subject" it was thought best to draw the matter to the attention of the appropriate Congressional committees.

On July 26, 1944, Commissioner Clifford J. Durr announced his dissent from the action of the Commission on July 18 in approving certain license transfers without hearing and stated his opinion, that, if the Commission were to

We do not contend that the state court is without authority to proceed immediately to enter an amended final decree if it wishes to do so; but we believe that this Court may appropriately point out the undesirability of such a conclusion to this litigation. Congress has not here, as it has with respect to other judicial proceedings affecting a public interest entrusted to regulatory agencies (cf. Sec. 1 of the Chandler Act, 11 U. S. C. Secs. 577, 578) provided for the submission of proposals through the courts to the appropriate administrative authority. This fact, however, need not prevent voluntary resort to a similar procedure, see *Hudson River R. Dist.* v. *F., J. & S. R. R. Co.*, 249 N. Y. 445, 454–455, which would operate upon the same principles as in the end were found to apply in the proceedings reviewed in *Atchison, Topeka & S. F. Ry. Co.* v. *Railroad Comm.*, 283 U. S. 380, and *State* v. *Atlantic Coast Line R. Co.*, 103 Fla. 1204, certiorari denied, 286 U. S. 557, but would operate much more smoothly and expeditiously in the absence of disputes as to jurisdiction. In this field, judicial and adminis-

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secure full information by means of hearings, it might conclude that "capitalization of licenses" contrary to the public interest was occurring and should be considered.

Both of the above documents are printed in full in the Appendix, *infra*, pp. 26–33.

As to the intended effect of the relevant Communications Act provisions see the discussions in Congress during the consideration of the Radio Act of 1927, which has become Title III of the present Act, at 68 Cong. Rec. 2573–2574, 2578–2579, 2869–2882, 4150–4153.

trative, state and national, authority should be correlative rather than competitive in operation, with resulting benefit to both.

The doctrine of primary jurisdiction as it has evolved (cf. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 139) suggests the procedural device to be recommended. Initially the doctrine involved situations in which a court, whether state or Federal, was said to be without jurisdiction because the entire question at issue was in the first instance one for administrative determination. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *St. Louis, etc. Ry. Co.* v. *Brownsville Nav. District,* 304 U. S. 295; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.,* 297 U. S. 500; *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. In *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, it was held that, although "The court [in a contract action] had jurisdiction of the subject matter and of the parties" (p. 432) and "should not" dismiss the cause (p. 433), it "should have stayed its hand pending the [Interstate Commerce] Commission's determination" (p. 433), in a proceeding to be begun, of a question upon which the plaintiff's right of recovery turned.

In the present case the respondent's right of recovery does not turn upon the Commission's action with regard to the broadcasting license; but the provisions of the court's final decree may well

be shaped in part, with benefit to all affected interests, by what the Commission says and does with respect to the license if it is afforded an opportunity.

The Supreme Court of Nebraska should, we believe, hold its judgment in abeyance for a reasonable time, pending a determination of the course to be followed. The Woodmen of the World Society presumably may choose whether it will seek to resume operation of the station itself or attempt to sell it to the same or to a different party upon terms which are consistent with state law. Whatever operation may be decided upon—whether by the Society, by Radio Station WOW, Inc. pursuant to a new contract, or by a third party—may then, after approval by the court, be submitted to the Commission in a proceeding for transfer of the license. If the Commission finds the proposed operation to be in the public interest it will give its consent, and the state court may then enter an appropriate order with respect to the physical property, thus consummating an arrangement approved both by the Commission and by the court. If the Commission withholds consent, adjustments may be made which will result in a proposal that is acceptable. In this way the physical property and the broadcasting license can be kept together and the interest of all parties and of the public be preserved.

CONCLUSION

We respectfully suggest to the Court that it remand this proceeding with recommendations for the further proceedings just outlined, but ask that, in any event, it require the modifications in the judgment of the Supreme Court of Nebraska which are urged in Point II of the Argument herein.

CHARLES FAHY,
Solicitor General.
RALPH F. FUCHS,
Department of Justice.

CHARLES R. DENNY,
General Counsel,

HARRY M. PLOTKIN,
Assistant General Counsel,
Federal Communications Commission.

MARCH 1945

APPENDIX

Decision and Order of the Federal Communications Commission

File No. B1-AL-390

In re: Application for consent to the assignment of license of Station WMCA, New York, N. Y., from WMCA, Inc. to Cosmopolitan Broadcasting Corporation

The present proceeding involves application for consent to the assignment of license of Station WMCA, New York, N. Y., held by WMCA, Incorporated, wholly owned by Edward J. Noble of New York City, to Cosmopolitan Broadcasting Corporation. Nathan Straus of New York City, and Davega-City Radio Incorporated own approximately 59% and 41%, respectively, of the voting stock of Cosmopolitan Broadcasting Corporation. The Commission finds that Cosmopolitan Broadcasting Corporation is legally, financially, and technically qualified to operate Station WMCA and that the proposed assignment is in the public interest. Accordingly, the Commission consents to the assignment.

Donald Flamm of New York City has petitioned for permission to intervene in the proceedings. The petition alleges that on or about August 10, 1943, he commenced an action in the Supreme Court of the State of New York against Edward J. Noble seeking to rescind the sale of Station

WMCA theretofore made by him to Noble, on the ground that said sale was induced by fraud, duress, conspiracy and undue influence; and prays for permission to intervene in order to show that the Commission should withhold action in the present proceeding until the pending suit "shall have been tried and it shall have been determined whether or not Donald Flamm is entitled to the rescission" of the sale. It appears from the petition that there has been no trial on the merits, that the court has denied an injunction against transfer of Station WMCA by Noble pending determination of the action, and that an appeal from the order of denial is pending.

Petitioner, Donald Flamm, for sometime prior to 1941 was sole stockholder of Knickerbocker Broadcasting Company, Inc., licensee of Station WMCA. Pursuant to application by Flamm and Noble, the Commission, on December 17, 1940, granted its consent to transfer of control of the licensee by the sale of all its outstanding stock to Noble. Thereafter, on December 23, 1940, Flamm filed a petition seeking to have the Commission reconsider its action and dismiss the application for transfer of control. The Commission dismissed the petition on January 7, 1941, and Flamm thereafter, on January 17, 1941, transferred the stock to Noble.

The instant petition to intervene must be denied. The only claim set forth as a basis for intervention is that if the petitioner should prevail in his pending suit against Noble, and if the Court should order rescission as prayed, the Commission, by consenting to the assignment, will have disabled Noble from complying with the Court's

order and rendered its judgment of no force and effect. Basically, therefore, the petition to intervene is simply a request that the Commission refuse to consent to the assignment of license until a final judgment is rendered in the pending action; in practical effect petitioner seeks here the relief denied him by the Court's refusal of an injunction *pendente lite*.

As a legal matter, however, petitioner's argument misconceives the respective jurisdictions of the Court and this Commission. On the one hand, the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of Station WMCA. The Commission has no power to act with respect to these matters and any action it takes in the present proceedings will not affect the Court's jurisdiction.

On the other hand, the Commission has, under the Communications Act of 1934, as amended, exclusive jurisdiction to determine whether, in any particular case, the license of Station WMCA to engage in radio broadcasting should be assigned in the public interest, convenience or necessity. Should petitioner prevail in his action, neither the Court nor Noble, acting pursuant to its order, has power to restore the license of Station WMCA to him without consent of the Commission. Commission consent to the proposed assignment, therefore, does not affect any remedy which it is within the Court's power to afford.

The petition has a final defect. It seeks to make action in the public interest wait upon the righting of an alleged private injury. The Commis-

sion has found that the proposed assignee is fully qualified to operate Station WMCA in the public interest. No fact which petitioner proposes to establish will in any way reflect upon the desirability of a transfer to the proposed licensee. Consummation of the transfer is not to be held up, perhaps for years, pending the settlement of issues in private litigation unrelated to the proposed operation. Especially compelling in the present case is the fact that Noble, in addition to being sole stockholder of the licensee of Station WMCA, is also the sole stockholder of American Broadcasting System, Inc. (Blue Network), licensee of a 50 kilowatt station (WJZ) which is located in New York City and serves substantially the area served by Station WMCA. Public interest expressed in Rule 3.106 against such multiple ownership will, therefore, be directly served by the proposed assignment.

Accordingly, it is ordered, this 16th day of November, 1943, that the application for consent to assignment of the license of Station WMCA (B1–AL–390) to Cosmopolitan Broadcasting Corporation be, and it is hereby, granted, and the intervention petition of Donald Flamm be, and it is hereby, denied.

TEXT OF LETTER FROM CHAIRMAN OF FEDERAL COMMUNICATIONS COMMISSION TO CHAIRMEN OF HOUSE AND SENATE INTERSTATE COMMERCE COMMITTEES

JULY 24, 1944.

DEAR ———: I hand you herewith a statement giving specific data on sales of radio broadcasting stations which have come before the Commission

during the calendar year 1944 to date. A number of these, and particularly several which were passed on at the Commission's meeting last week, involved a consideration overwhelmingly in excess of the physical value of the properties transferred, and it seems fair to deduce that the consideration in a number of the cases appears to go beyond any reasonable amount which could be assigned to the value of the physical properties plus good will, going-concern, etc. Data with respect to sales during earlier periods may be found in part in the Hearings before the House Committee on Appropriations on the Independent Offices Appropriation Bills (for 1945, following page 1286; for 1944, following page 1248; for 1943, following page 334; for 1942, following page 667 of Part I; for 1940, pocket supplement) and in part in the Congressional Record (86 Cong. Rec. 434; 83 Cong. Rec. 112 and 81 Cong. Rec. 786).

The Congress has had before it proposals to limit the amount of consideration to the value of the physical properties transferred but no provision of this character has been adopted. The statute does make clear that the frequencies are not in any way the property of the licensees. The Commission has rejected and is prepared to reject any transfer which on its face involves a consideration for the frequency. The Commission, apparently consistent with Congressional policy, has approved transfers that involve going-concern values, good will, etc. There remains, however, a serious question of policy and one on which the law is not clear, as to whether the Commission should approve a transfer wherein the amount of the consideration is over and beyond any amount

which can be reasonably allocated to physical values plus going-concern and good will, even though the written record does not itself show an allocation of a sum for the frequency. Our concern in this regard is heightened by the tremendously high prices which radio stations are commanding in the present state of the market. This is illustrated by the fact that one local station was sold for a half-million dollars and some regional stations are selling for a million or more.

It is the Commission's policy to disapprove of transfers which obviously represent the activities of a promoter or broker, who is simply acquiring licenses and trafficking in them. Under the present state of the law, however, it is not clear that the Commission has either the duty or the power to disapprove of a transfer merely because the price is inordinately high even though it may well be deduced that a substantial value is placed on the frequency. In the absence of a clear Congressional policy on this subject, we thought best to draw the matter to the attention of your own Committee and the Senate Committee on Interstate Commerce.

* * * * *

JAMES LAWRENCE FLY,
Chairman.

DISSENT OF COMMISSIONER DURR OF THE FEDERAL COMMUNICATIONS COMMISSION.

JULY 26, 1944.

Re: J. Leslie Doss, Transferor George Johnston, Transferee Bessemer, Alabama (WJLD).

Lawrence J. Heller, et al., Transferors Eugene Meyer and Agnes Meyer, d/b as The Washington Post, Transferees Washington, D. C. (WINX). John V. L. Hogan, Transferor New York Times Company, Transferee New York, N. Y. (WQXR and WQXQ).

My reason for voting against approval of the above assignments of license was the same in all three cases. The prices being paid for the stations seemed to me to raise serious questions of law and public interest, and I therefore think that each application should have been set for hearing to ascertain:

(a) Whether or not any part of the purchase price represents payment for a radio channel in violation of Sections 301 and 309 (b) of the Communications Act of 1934, as amended, and,

(b) Whether the amount being invested in the station by transferee will affect the operations of the station in the public interest.

Station WJLD, Bessemer, Alabama, is a 250-watt station operating on a local channel. The replacement cost of all its physical properties, real and personal, is only $12,269, and the original cost $12,019. The net worth of all of its assets, tangible and intangible, according to its books, is $14,236. For the year 1943, its net income before Federal taxes and without deduction of any salary for the proprietor was $4,966. The purchase price being paid is $106,000, which is more than *seven* times the net worth of the station and more than *twenty-one* times its net profits before Federal taxes.

Station WINX, Washington, D. C., is likewise a 250-watt station operating on a local channel, but operates with a booster which serves to extend its coverage. The replacement cost of all its physical properties, real and personal, is only $58,492, and the original cost $56,966. The net worth of all of its assets, tangible and intangible, according to its books, is $48,254. For the year 1943, its net income before Federal taxes was $20,186. The purchase price being paid is $500,000, which is more than *ten* times the net worth of the station and more than *twenty-four* times its net profits before taxes.

Station WJLD was first licensed only a little more than two years ago and Station WINX less than four-and-one-half years ago. The purchase price being paid for WJLD represents a profit of nearly 800 per cent on the cost of its physical properties and over 650 per cent on its net worth. The purchase price being paid for WINX represents a profit of nearly 800 per cent on the cost of its physical properties and over 950 per cent on its net worth.

Station WQXR, New York, N. Y., is a 10-kw station and WQXQ is a frequency modulation (FM) station. No figures were before the Commission as to the replacement cost or the original cost of the physical properties involved in the transfer. However, the net worth of all of the assets of the present licensee corporation, both tangible and intangible, is $227,037. For the year 1943, its net income before Federal taxes was $30,320. The purchase price being paid is approximately $1,000,000, which is approximately *four-and-one-half* times the net worth of the

licensee corporation and nearly *thirty-three* times its net profits before taxes.

Radio broadcasting is competitive and it is not the function of the Commission to protect either the buyers or the sellers of radio stations from the consequences of the exercise of their own business judgment. However, the Commission does have the responsibility of seeing to it that licensees observe the provisions of the Communications Act and that licenses for the operation of broadcasting stations are neither granted nor transferred unless the public interest will be served. Its responsibility in approving transfers is no less than its responsibility in making original grants of licenses. Section 310 (b) of the Act provides:

> The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, *after securing full information*, decide that said transfer is in the public interest, and shall give its consent in writing. [Italics supplies.]

Sections 301 and 309 (b) of the Communications Act provide clearly that radio channels are public property and incapable of private ownership. It follows that neither the channels nor any right to use them is for sale, either by private individuals or by the Government. The Communications Act provides that they are to be licensed by the Commission, only for limited periods of

time, and only to whose whom the Commission finds best qualified, by ability and intention, to use them in the public interest. Ability to outbid others in the price offered for a station has no relation to qualifications of this kind.

In each of the three transfers under consideration, the price being paid appears, on its face, to be greatly in excess of any demonstrated value of the properties and business being sold. For what is this excess being paid? Are there elements of value in the transferors' properties and businesses which are not apparent from the information contained in their applications, or are they selling something they do not own and have no right to sell, namely, the use of a radio channel? Moreover, the new licensees are taking on financial loads many times greater than those of the old licensees. All of these stations are commercial stations, and it is reasonable to assume that the purchaser of a commercial station buys with the expectation of earning at least a reasonable return on his investment. In the present cases, do the transferees regard their purchases as business ventures, or do they intend to operate the stations without regard to profit? If the former, how do they expect to operate the stations so that they will be self-sustaining and at the same time yield a fair business return on investments ranging from four-and-one-half to ten times the investments of the former licensees? Is it anticipated that profits will be increased through more economical and efficient operations or by increasing the price per unit of time sold, or is it contemplated that a substantial amount, if not all, of the

increased profits will have to come from selling more time? If more time is to be sold, will a reasonable amount of the free time still be left for local civic programs, educational programs, the discussion of controversial public issues, and other sustaining programs?

It seems to me that the applications, on their face, point to the need of "securing full information" before the Commission can decide that the transfers are in the public interest.

Far from the least important feature of our American broadcasting system is that the cost of establishing and operating radio stations has been within the reach of qualified individuals and groups having only moderate financial means. In many communities, all presently available standard radio channels are occupied and the only way for a newcomer to get into the field is by the purchase of an existing station. The present inflationary trend in the price of radio stations, if continued, will tend not only to increase still further the already tremendous pressure on sustaining programs but also to push radio broadcasting more and more beyond the reach of any but the well-to-do. Certainly the inflationary trend should not be encouraged by permitting the capitalization of licenses.

C. J. DURR,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES.

No. 593.—October Term, 1944.

Radio Station WOW, Inc. (a Nebraska Corporation), Woodmen of the World Life Insurance Society (a Nebraska Corporation), De E. Bradshaw, et al., Petitioners,
vs.
Homer H. Johnson.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[June 18, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case concerns the relation of the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. §151 *et seq.*, to the power of a State to adjudicate conflicting claims to the property used by a licensed radio station. At the outset, however, our right to review the decision below is seriously challenged.

The facts relevant to the jurisdictional problem as well as to the main issues are these, summarized as briefly as accuracy permits. Petitioner, Woodmen of the World Life Insurance Society, a fraternal benefit association of Nebraska, owns radio station WOW. The Society leased this station for fifteen years to petitioner, Radio Station WOW, Inc., a Nebraska corporation formed to operate the station as lessee. After the Society and the lessee had jointly applied to the Federal Communications Commission for consent to transfer the station license, Johnson, the respondent, a member of the Society, filed this suit to have the lease and the assignment of the license set aside for fraud. While this suit was pending, the Federal Communications Commission consented to assignment of the license, and the Society transferred both the station properties and the license to the lessee. Thereafter the Society answered that "the Federal Communications Commission . . . has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer

of said license to the defendant Radio Station WOW, Inc. and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found". Respondent's reply admitted "that the Federal Communications Commission has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license to operate said radio station." The trial court found no fraud and dismissed the suit.

The Supreme Court of Nebraska, three Judges dissenting, reversed and entered judgment for respondent, directing that the lease and license be set aside and that the original position of the parties be restored as nearly as possible. 144 Neb. 406, 13 N. W. 2d 556. The judgment further ordered that an accounting be had of the operation of the station by the lessee since it came into its possession and that the income less operating expenses be returned to the Society.[1] On motions for rehearing, the petitioners asserted that only the Federal Communications Commission and the federal courts had jurisdiction over the subject matter, not the Nebraska courts. These motions were denied in an opinion in which the Nebraska Supreme Court stated, "We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission. . . . The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal

[1] The judgment directed "that said judgment of the district court be, and hereby is, reversed and cause is remanded, with directions that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside; that the $25,000 of accounts turned over by the society to lessee be returned; that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the lease; that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning same to the society pursuant hereto are to be paid by the lessee. It is further ordered and adjudged that all costs, both in this court and in the district court shall be paid by the defendants, except the Woodmen of the World Life Insurance Society, costs in this court being taxed at $....; for all of which execution is hereby awarded, and that a mandate issue accordingly."

license being a question solely for the Federal Communications Commission. Our former opinion should be so construed." The claim that the Nebraska courts had no jurisdiction over the subject matter of the action was thus dealt with: "The fact that the property involved was used in a licensed business was an incident to the suit only. The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." 144 Neb. 432, 14 N. W. 2d 666. Because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission, we granted certiorari. In the order allowing certiorari we directed attention to the questions whether the judgment is a final one and whether the federal questions raised by the petition for certiorari are properly presented by the record. 323 U. S. 705.

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. See *Heike* v. *United States*, 217 U. S. 423; *Cobbledick* v. *United States*, 309 U. S. 323; *Catlin* v. *United States*, 324 U. S. — (decided February 26, 1945). This requirement has the support of considerations, generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree". Section 237 of the Judicial Code, 28 U. S. C. § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

But even so circumscribed a legal concept as appealable finality has a penumbral area. The problem of determining when a liti-

gation is concluded so as to be "final" to permit review here arises in this case because, as has been indicated, the Nebraska Supreme Court not only directed a transfer of property, but also ordered an accounting of profits from such property. Considerations of English usage as well as those of judicial policy would readily justify an interpretation of "final judgment" so as to preclude reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State. Specifically, it might well be held that, even though definitive rulings on questions otherwise reviewable here have been made below, such rulings cannot be brought here for review if the State court calls for the ascertainment by a master or a lower State court of an account upon which a further decree is to be entered. See *California National Bank* v. *Stateler*, 171 U. S. 447, 449; Boskey, *Finality of State Court Judgments under the Federal Judicial Code* (1943) 43 Col. L. Rev. 1002, 1009; Robertson and Kirkham, Jurisdiction of the Supreme Court (1936) p. 58.

Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it. To enforce it now, or to pronounce it for the future, would involve disregard of at least two controlling precedents, both of them expressing the views of unanimous courts and one of which has stood on our books for nearly a hundred years in an opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney. Leaving to a footnote the details of a somewhat sinuous story,[2] it suffices to say that *Forgay* v. *Conrad*, 6

[2] Most of the cases cited which involve an accounting have come from federal courts. In this category are Forgay v. Conrad, 6 How. 201; Thomson v. Dean, 7 Wall. 342; Winthrop Iron Co. v. Meeker, 109 U. S. 180; Keystone Iron Co. v. Martin, 132 U. S. 91; McGourkey v. Toledo & Ohio Railway, 146 U. S. 536; Gulf Refining Co. v. U. S., 269 U. S. 125.

In the *Forgay* case the court below set aside a conveyance of land and slaves and ordered a master to take an accounting of the rents and profits. This Court held the decree to be appealable since immediate delivery of the property was ordered although the decree was "not final, in the strict, technical sense of that term". The Court said of the lower court judgment that "the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants". 6 How. 201, 204. It was suggested that if appellants had to wait, they would be subjected to irremediable injury, for execution had been awarded. Also held final was the decree in Thomson v. Dean, *supra*, where the court ordered immediate transfer of stock and an accounting to determine the amounts paid

How. 201, and *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, found the requirement of finality to be satisfied by judgments the characteristics of which cannot be distinguished from those presented by the Nebraska decree. In short, the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order. In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled. Compare *Clark* v. *Williard*, 292 U. S. 112, 117-119; and see Note (1934) 48 Harv. L. Rev. 302.

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and to be paid and the dividends accrued. In Gulf Refining Co. v. U. S., *supra*, a judgment was held to be final where the original decrees enjoined defendants from taking oil from Government property and confirmed an accounting to January 1, 1918, although the decree appealed from ordered a further accounting for oil extracted *pendente lite*. The Court observed that the decrees were final for the purpose of the original appeals. All of these cases rely on the fact that there had been a conclusive adjudication of the rights and liabilities of the parties with immediate delivery of possession of the subject matter of the suit. This consideration was emphasized in Grant v. Phoenix Ins. Co., 106 U. S. 429, 431-432, and in Collins v. Miller, 252 U. S. 364, 371.

Another line of cases starts with Winthrop Iron Co. v. Meeker, *supra*, where a decree was held final, although an accounting was ordered, because no accounting had been prayed for in the bill. This unsubstantial distinction was seized upon in Keystone Iron Co. v. Martin, *supra*, and in McGourkey v. Toledo & Ohio Railway, *supra*, to hold not final decrees in cases where an accounting had been sought.

The cases from State courts are less numerous. California National Bank v. Stateler, *supra*, stated broadly that a judgment remanding for an accounting is not final. In that case, an intervening party, appointed pursuant to State law as agent for bank stockholders, secured an order directing that money be turned over to him less the holder's costs, disbursements and attorney's fees. In addition, if it should be found that the holder had received certain stock as alleged then the stock also should be turned over. But there was no immediate delivery of anything since the amount of money to be turned over remained to be ascertained as did the existence of the stock. And in Sand Springs Home v. Naharkey, 299 U. S. 588, the Court denied certiorari "for the want of a final judgment" in a case where the plaintiff's right to an undivided one-sixth interest in land was decreed plus an accounting for profits from the gas taken out of the land. In the absence of a partition, there could of course be no delivery of the property itself.

Opposed to the general observations in the *Stateler* case is the square ruling in Carondelet Canal Co. v. Louisiana, 233 U. S. 362. The State Supreme Court ordered that judgment be entered requiring delivery of a canal to Louisiana. Certain claims with respect to a small additional plot of ground were reserved and an accounting of receipts and disbursements in the management of the property was ordered. This Court denied a motion to dismiss for want of a final judgment. It noted that the decree required immediate delivery of the property to the State so that the decree possessed definiteness as to the matter decided. "In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved.'" 233 U. S. 362, 372.

The presupposition in allowing such review is that the federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a federal question. Of course, where the remaining litigation may raise other federal questions that may later come here, such as is true of eminent domain cases, see *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews. Since, by awarding an execution, the Nebraska Supreme Court directed immediate possession of the property to be transferred, the case comes squarely within *Forgay* v. *Conrad, supra*, and *Carondelet Canal Co.* v. *Louisiana, supra*, and the challenge to our jurisdiction cannot be sustained.

This brings us to consider what federal questions are here. The court below decreed the transfer of property used as a radio station. It conceded that it had no jurisdiction over the transfer of the license under which WOW was operating. That is a matter which Congress has put in the keeping of the Federal Communications Commission. Petitioners claim that the court's decree in effect involves an exercise of the very authority which the court disavowed. This presents a federal question which was duly made below, and we must consider it.

But it is not open to us to consider independently the claim that the Federal Communications Act has withdrawn from the State court jurisdiction over the physical properties of the station and given it to the Federal Communications Commission. The Society's answer admitted that this controversy was outside the jurisdiction of the Commission except as it related to the transfer of the license, and respondent joined in this view. Only after the Nebraska Supreme Court's original opinion did petitioners, by motions to dismiss the suit and for rehearing, claim that the Nebraska courts were wholly without jurisdiction over the controversy. In its opinion on rehearing the Nebraska Supreme Court rejected this claim as "contrary to the pleadings filed" in the trial court, and also denied it on its merits. "The answer of the defendants, heretofore quoted," that court wrote, "squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." Questions first presented to the highest State court on a petition for re-

hearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition. *Simmerman* v. *Nebraska*, 116 U. S. 54; *Godchaux Co.* v. *Estinopal*, 251 U. S. 179; *American Surety Co.* v. *Baldwin*, 287 U. S. 156. Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch* v. *New York*, 293 U. S. 52, 54-55. One of the petitioners, Radio Station WOW, Inc., seeks to avoid the force of this rule by suggesting that its answer did not make the concession as to the limited jurisdiction of the Federal Communications Commission upon which the Nebraska court relied. But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue. See *Neilson* v. *Lagow*, 12 How. 98, 109-111. It may be Nebraska practice that the answer of one defendant binds the others, or that failure to raise a question in the pleadings precludes its consideration on rehearing. These are matters of State law and not our concern. Cf. *Fair Haven R. R. Co.* v. *New Haven*, 203 U. S. 379, 386.

The federal question that remains is whether, although the Nebraska court clearly recognized that the power to vacate a license and to authorize its transfer lies exclusively with the Federal Communications Commission, its decree in effect is inconsistent with such recognition. This is urged on two grounds. It is asserted that the Nebraska Supreme Court, by ordering the transfer of the licensed facilities from Radio Station WOW, Inc. to the Society although not having power to direct the transfer of the license, severed the licensed facilities from the license and therefore nullified the license. Secondly, it is urged that by ordering the parties "to do all things necessary" to secure a return

of the license to the defrauded Society, the State court invaded the Commission's function.

The judgment, following the original opinion, ordered that "the transfer of the license to operate the station be vacated and set aside". On rehearing, the court made it quite plain that it was within the exclusive jurisdiction of the Communications Commission to vacate radio licenses and declared that its former opinion should be so construed. While it did not formally modify its judgment, it is reasonable to assume that the view which it unambiguously rejected in its opinion it did not mean to assert through its judgment. *Hotel Employees' Local* v. *Board*, 315 U. S. 437, 440-441; *Burke* v. *Unique Printing Co.*, 63 Neb. 264. But in matters of potential conflict between State and federal authorities, avoidance of needless friction no less than good draftsmanship counsels explicit and not merely argumentative restriction of a State court's judgment within its powers.

In any event, we think the court went outside its bounds when it ordered the parties "to do all things necessary" to secure a return of the license. Plainly that requires the Society to ask the Commission for a retransfer of the license to it and requires WOW not to oppose such transfer. The United States, in a brief filed at our request, suggests that this provision of the decree would probably also disqualify WOW from "applying for a new license to operate a radio station in Omaha on the same frequency, should it become equipped to do so." To be sure, the Communications Commission's power of granting, revoking and transferring licenses involves proper application of those criteria that determine "public convenience, interest, or necessity". Section 307(a), 48 Stat. 1064, 1083, 47 U. S. C. § 307(a). But insofar as the Nebraska decree orders the parties "to do all things necessary" to secure the return of the license, it hampers the freedom of the Society not to continue in broadcasting and to restrict itself, as it properly may, to its insurance business. Equally does it prevent WOW from opposing a return to the Society, or, as the United States suggests, from seeking another license of its own. These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of parties before the Communica-

tions Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.

The most troublesome question raised by this case remains. While the decree of the State court concerning the transfer of the leasehold is, in view of the pleadings, not here as an independent question, due consideration of the federal question relating to the transfer of the license makes it proper to consider the bearing of a decree ordering an immediate transfer of the leasehold upon the status of the radio license. A proper regard for the implications of the policy that permeates the Communications Act makes disposition of licensed facilities prior to action by the Communications Commission a subsidiary issue to the license question. We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW, and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The "public interest" with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud.

On the other hand, if the State's power over fraud can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, should be observed. Severence of the licensed facilities from the license so precipitously that the Federal Communications Commission is deprived of the opportunity of enabling the two to be kept together needlessly disables the Commission from protecting the public interest committed to its charge. This presents a practical and not a hypothetical situation. To carry out abruptly a State decree separating licensed facilities from the license

deprives the public of those advantages of broadcasting which presumably led the Commission to grant a license. To be sure, such a license is merely a permit to serve the public and not a duty to do so. Therefore, as we have concluded, the State has not been deprived by federal legislation of the practical power to terminate the broadcasting service by a proper adjudication separating the physical property from the license. We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station. Of course, the question of fraud adjudicated by the State court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties.

New situations call for new adaptation of judicial remedies. We have had occasion to limit the conceded jurisdiction of the federal courts in order to give State courts opportunity to pass authoritatively on State issues involved in federal litigation. See, *e. g., Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101. It will give full play both to the powers that belong to the States and to those that are entrusted to the Federal Communications Commission, where the two are intertwined as they are here, to enforce the accommodation we have formulated.

Accordingly, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Mr. Justice JACKSON, dissenting.

I am unable to agree with the Court's disposition of this case and will indicate briefly the reason.

Petitioner is incorporated under the laws of Nebraska and operates a radio station owned by the Woodmen of the World, an insurance society also organized under the laws of Nebraska. It

is clear that the State of Nebraska has plenary power over the internal affairs of both of these corporations.

The Woodmen of the World, in addition to its insurance business, went into the radio business through radio station WOW. It became involved in controversies and eventually decided that it ought to get out of the radio operation.

From 1923 to 1928, it had carried the radio station at a loss but its net average earnings from 1936 to 1942 were $194,724.14 per year. The property and facilities of the corporation were leased to a new corporation in 1942 for $74,000.00 per year. The new corporation consisted of organizers whom the Court found sustained such a relation to the President of the insurance company who managed the negotiations on its behalf that the transfer constituted a constructive fraud on policy holders. It ordered that the transaction be undone and complete restitution be made. I take it that this judgment was fully within the competence of the State.

Meanwhile, the transferees had obtained approval of the Federal Communications Commission of the transfer of the license to them. Because of this, it is claimed that in some way the power of the State to undo this transaction is limited. Certainly no power has been conferred on the Federal Communications Commission to hear, try or determine the case of fraud between Nebraska stockholders and the officers of Nebraska corporations. The Commission has, of course, powers to look after the public interest in the transfer of stations.

There is possibility of conflict between the judgment rendered by the state court of Nebraska and the Federal Communications Commission and this possibility of conflict leads to the decision of the Court today. That conflict can occur only if the Federal Communications Commission shall hold that the federal public interest requires this radio station to be kept in the hands of those who are adjudged to be guilty of fraud and that the public interest cannot be served by those who have been adjudged to have been victims of that fraud although they had operated the station for many years with success and without any question as to the public interest. If the Communications Commission should render such a decision by refusing to retransfer the license in accordance with the judgment we would then have a question

as to the faith and credit due the state court judgment and its effects in an administrative tribunal. I would deal with that sort of question not hypothetically, but when it arises and upon the record which is made before the Communications Commission.

But even if the Commission should decide that the federal interest requires this station to be operated by those who have obtained it by constructive fraud, I think the judgment of the state court of Nebraska would still be good. It has the power not only to compel restitution of property obtained from its corporations in violation of its laws but if by federal proceedings or otherwise the wrong doers have put some part of the value of this station beyond their power to recapture, the State has the right to compel them to account for its value. The State, it seems to me, has the right to strip the wrongdoers of every fruit of the wrong including the value of the federal license even if the license itself cannot be obtained.

For these reasons, I would affirm the judgment of the Nebraska courts and leave the problem of conflict to be dealt with when and if it arises.